

DILEMMA ASSOCIATED WITH CERTIFYING CALFED EIR/EIS IN CURRENT FORM

The CALFED "Framework for Action" document ("Framework") recently negotiated between Governor Davis and Secretary Babbitt contains features - most notably supply projects - not analyzed in the EIR/EIS prepared over the last several years. This fact creates a very serious dilemma, which can only be resolved by making sure the "CEQA findings" currently being prepared by the Attorney General's office include certain language. Apparently these findings are projected to include a Stage II report which identifies which of the features of the Framework are within and outside the EIR/EIS.

In fact, such findings will assert that *the EIR/EIS does not cover certain features of the Framework*, which therefore cannot be formally "approved" within the meaning of CEQA. Such "approval" is necessary for an agency action affecting the environment to have the force of law. Importantly, by approving only certain features of the Framework, the nexus between the environmental restoration projects, explicitly analyzed and approved in the EIR/EIS, is severed for the omitted features or projects. Such a course will put future supply projects in jeopardy, for reasons explained below.

However, there is an approach that may help avoid this train wreck. To understand this alternative approach, and its significance, requires a brief understanding of the niceties of how CEQA works:

The CALFED EIR has been prepared as a "program EIR." Such documents are normally prepared in connection with an agency "program" consisting of a series of related actions implemented over time. These later implementing actions, which typically involve later more focused EIRs building upon the program EIR as a data base, must be *consistent* with the program approved based on the program EIR.

This consistency requirement creates another thorny issue for CALFED. If the CEQA findings approved for CALFED state, in effect, that supply projects in the Framework are not really part of the approved "program," it is very likely that future reviewing courts will conclude that such supply projects are *inconsistent* with CALFED itself, and thus *cannot be implemented*. Under such a scenario, the only way to obtain approval for supply projects would be to revisit the entire legal superstructure of CALFED, and to prepare another program EIR. To revisit the entire environmental analysis of the CALFED program is contrary to the spirit and intent of the Framework. The proposed exclusion by the AG staff of some of the projects from the scope of the CALFED Program EIR does not provide an adequate shield. In fact the exclusion could become the key feature of any future judicial challenge by environmental groups or other interest groups who might seek to attack the overall program.

For these reasons, it is imperative that the CEQA findings recharacterize the EIR portion of the EIR/EIS as something other than a program EIR. To make sure this happens, the

Resources Agency should actively participate in writing the findings, and should include within them language indicating that the EIR/EIS is not really a *program EIR*, but instead includes analysis of only certain parts, but not all, of the Framework. Other parts - such as supply projects - will require additional environmental review, which can build upon the existing EIR/EIS but not be nixed because they're outside the approved "program."

As ultimately drafted by the Resources Agency, the findings would characterize the EIR/EIS as something akin to what the CEQA Guidelines call a "Master Environmental Assessment" ("MEA"). An MEA is a data base of scientific and technical information that can be used in future EIRs. Significantly, however, the mere existence of an MEA does not limit the discretion of agencies relying on the information. In this sense, it provides many of the benefits of a program EIR without the downside of diminishing agency discretion.

It will be politically unacceptable to merely announce that, after all these years, what was once an EIR/EIS is now a mere MEA, which isn't really an EIR at all. The next best thing, though, would be to include in the CEQA findings language describing the current EIR/EIS in a way that very closely tracks the language found in the description of MEAs provided by the CEQA Guidelines. The insertion of such language in the findings might be enough to permit the State to certify the CALFED EIR without creating problems for future water supply projects contemplated by the Framework.

Finally, the strategy suggested herein maintains the political linkages which are key to the survival of the Framework while reducing a key risk to the success of the overall program.